IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.882 OF 2002
IN
NOTICE OF MOTION NO.1609 OF 2002
AND
NOTICE OF MOTION NO.2380 OF 2002
IN
LONG CAUSE SUIT NO.2830 OF 2002

1) Mr.Chandru Punjabi)
Off at Prabha Kunj at Plot No.498)
Behind KBN Stores, Link Road)
Mumbai 400 052.)

2) Mr.Husseini T. Mamoowala)
Off at Prabha Kunj at Plot No.498)
Behind KBN Stores, Link Road)
Mumbai 400 052.)

3) Mr.Ramesh Kasbekar)
Off at Prabha Kunj at Plot No.498)
Behind KBN Stores, Link Road)
Mumbai 400 052.)

4) Mr.Pradeep Dhairyawan)
Off at Prabha Kunj at Plot No.498)
Behind KBN Stores, Link Road)
Mumbai 400 052.)

5) Mr.Amar Nagpur)
Off at Prabha Kunj at Plot No.498)
Behind KBN Stores, Link Road)
Mumbai 400 052.)

6) Mr.Ramesh Govani)
Kamla Mills Ltd., Kamla House)
Senapati Bapat Marg)
Mumbai 400 003)
C/o.Off at Prabha Kunj at Plot)
No.498, Behind KBN Stores)
Link Road, Mumbai 400 052.)

7) M/s.Sampati Builders Pvt. Ltd.)
Through Director)
Mr.Husseini T. Mamoowala)
Off at Prabha Kunj at Plot No.498)
Behind KBN Stores, Link Road)
Mumbai 400 052.)

2) M/s.Prakalp Investments Pvt. Ltd.)
Off at Prabha Kunj at Plot No.498)

Behind KBN Stores, Link Road)
Mumbai 400 052.).. APPELLANTS

Versus

1) Mrs.Sonia Sood)
Adult, Indian Inhabitant)
Resident of 7-G, Girnar Apartment)
55, Pali Hill, Nargis Dutt Road)
Bandra (W), Mumbai 400 050.)

2) The Bombay Municipal Corporation)
Municipal Corporation Building)
Mahanagar Palika Marg)
Mumbai 400 001.)

3) The Municipal Commissioner)
The Bombay Municipal Corporation)
Municipal Corporation Building)
Mahanagar Palika Marg)
Mumbai 400 001.)

4) The Executive Engineer)
Building Proposal Department)
The Bombay Municipal Corporation)
H-Ward, Bandra(W), Mumbai 400 050.)

5) The Secretary of Revenue and Forest)
Revenue Department)
State of Maharashtra, Mantralaya)
Mumbai 400 021.)

6) The Collector and Competent)
Authority for Bandra(W))
Collectorate Bombay Suburban)
District, MHADA Building)
Bandra (E), Mumbai 400 050.)

7) The Sub-Divisional Officer for)
Bandra (W), Collectorate Bombay)
Suburban District, MHADA Building)
Bandra (E), Mumbai 400 050.).. RESPONDENTS

Mr.Janak Dwarkadas, Senior Counsel, with Mr.Shyam Mehta, Mr.Altab Diamondwala, Mr.Akshay Patil and Ms.Punita i/b.Divya Shah Associates for the Appellants.

Mrs.Sonia Sood, Respondent No.1, in person.

Mrs.G.P.Mulekar, Assistant Government Pleader, for Respondent Nos.5, 6 and 7.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON : 1ST DECEMBER 2004

JUDGMENT PRONOUNCED ON : 15TH FEBRUARY 2005

JUDGMENT :

. This Appeal From Order challenges the common order dated 3rd September 2002 passed on two Notices of Motion. Notice of Motion No.2380 of 2002 was taken out by the Appellants for a direction to the Registrar of the City Civil Court to obtain an expert opinion of the handwriting expert on the alleged signature of Respondent No.1 on the agreement dated 20th August 1997 by comparing the same with the admitted signature of Respondent No.1. Notice of Motion No.1609 of 2002 taken out by Respondent No.1 for a mandatory injunction against the Appellants directing them to demolish the building and perpetual injunction restraining them from carrying out any further construction at 55, Pali Hill, Nargis Dutt Road, Bandra (West), Mumbai-50 was also decided by the same order.

2. Sushilarani Baburao Patel and Shirin Baburao Patel were the owners of the land admeasuring 5300 sq.yds. at Pali Hill, Bandra with a structure known as Girnar Bungalow standing thereon. This area was allotted CTS Nos.910 and 914 to 917. By a lease deed dated 2nd August 1963, 2000 sq.yds. of the suit property was leased out to M/s.Bajaj Builders for a term

of 98 years at a lease rent of Rs.3000/- per month. Bajaj Builders were permitted to construct a building on this land with a total carpet area not exceeding 28,500 sq.ft. The right to utilise and consume any further FSI in respect of the suit property was retained by the owners. A building known as Girnar Apartments was constructed on the land in 1967 utilising the entire FSI. Flat purchasers of Girnar Apartments formed and registered a society known as Girnar Apartments Co-operative Housing Society Limited in March 1971. Respondent No.1 is a member of this society and occupies a flat in the building. A Deed of Assignment was entered into between Bajaj Builders and the society whereby the right, title and interest of Bajaj Builders to the 2000 sq.yds. was assigned to the society.

3. On 9th June 1992, a part of the property was acquired by the Bombay Municipal Corporation for road widening. As a result, the owners of the property were entitled to additional FSI. The society filed Long Cause Suit No.3936 of 1992 against Sushilarani Baburao Patel in the Bombay City Civil Court claiming the FSI which the owners had acquired as a result of road widening. On 11th June 1994, the owner Sushilarani Baburao Patel and Appellant Nos.1 to 4 and certain other persons entered into an agreement under which Sushilarani Patel granted development rights for the

property to these persons. At a Special General Body Meeting of the society held on 26th March 1995, consent terms which were arrived at between Sushilarani Patel and Appellant Nos.1 to 4 and certain others were approved. Minutes of the Order were entered into between the society and Sushilarani Patel in the Long Cause Suit No.3936 of 1992 on 10th April 1995. Under these Minutes of the Order, the society, inter alia, agreed and undertook not to raise any objection to Sushilarani Patel taking any benefits from the Corporation with regard to the set back area or with regard to any other area of the property except the leasehold rights in respect of 2000 sq.yds. The society was paid Rs.36 lakhs in consideration of this undertaking. The society agreed further that it would not have any future claim or right by way of FSI, TDR, etc. besides other benefits which were available under the provisions of law with regard to any part of the property except the leasehold rights in respect of 2000 sq.yds. Deed of Conveyance was entered into on 11th April 1995 between Sushilarani Patel on the one hand and Appellant Nos.1 to 4 (members of the Karia family) whereby she conveyed an undivided 70% share in the right, title and interest of the property to the aforesaid persons. The Suit came to be disposed of in terms of the Minutes of the Order on 17th April 1995.

4. Plans were submitted by the Appellants for development and construction over the bungalow and the rest of the property known as Girnar Bungalow. The Corporation sanctioned the plans and issued IOD. The layout which was approved included Girnar Apartments and the proposed development over Girnar Bungalow. The proposed development/construction over this bungalow was to be carried out by utilising the FSI available in lieu of the set-back and the acquired TDR. The sanctioned plans were amended subsequently and commencement certificate was issued on 4th January 1996. The Appellants claimed that certain disputes existed between them and Respondent No.1 on account of certain illegal constructions that she had carried out in her flat. All these disputes culminated in an agreement between Appellant No.7 and Respondent No.1 on 20th August 1997. The Appellants claimed that Respondent No.1 under this agreement had agreed not to raise any dispute with respect to the building under construction either as an individual member of the society or as the Chairman or Managing Committee member of the society. Respondent No.1 has disputed her signature on this document.

5. Appellant No.7 commenced construction of the building in 1998. On 15th October 2001, the final amendments to the sanctioned plans were approved by the Bombay Municipal Corporation. Construction of the

building continued. The Appellants claimed that this construction was in the nature of additions and alterations to Girnar Bungalow which was permissible under the Bombay Municipal Corporation Act and the Development Control Regulation for Greater Bombay, 1991.

6. Respondent No.1 filed the present Suit before the Bombay City Civil Court on 19th April 2002 challenging the construction of a building by the Appellants. According to Respondent No.1, the Appellants had no right or interest in the use of the FSI and TDR in respect of the entire property and, therefore, a mandatory injunction was sought against the Appellants directing them to demolish the building and for a perpetual injunction restraining them from carrying out any further construction. Respondent No.1 had sought interim relief by way of Notice of Motion No.1609 of 2002. Her main grievance was that the Appellants had flouted the Development Control Regulations and were constructing a building without leaving the necessary open space for recreation. Ad-interim reliefs were declined and, therefore, Respondent No.1 preferred an Appeal before this Court being Appeal From Order (Stamp) No.1831 of 2002. This Court while declining to grant any ad-interim order on 30th April 2002 observed that the Appellants would abide by any further orders that would be passed in the Motion

in respect of any further construction carried out by them.

7. The Appellants at the hearing of the Motion, had sought to rely on the agreement which they claimed was signed by Respondent No.1 on 20th August 1997 and which had been denied by Respondent No.1. The Appellants, therefore, took out Notice of Motion No.2380 of 2002 seeking a direction from the Court to appoint a handwriting expert for his opinion on the signature on the agreement by comparing it with an admitted signature of Respondent No.1.

8. Both the Notices of Motion were heard together and the City Civil Court by its impugned order dated 3rd September 2002 restrained the Appellants from carrying out any further construction. The Court also allowed the Notice of Motion taken out by the Appellants. Aggrieved by the decision of the City Civil Court, the present Appeal From Order has been filed challenging the order in so far as it restrains the Appellants from carrying out further construction. Writ Petition No.5697 of 2002 has been filed in this Court by Respondent No.1 which has been admitted and the direction of the City Civil Court appointing a handwriting expert has been stayed. Although, the present Appeal From Order was admitted on 9th October

2002, this Court declined to grant any stay of the impugned order. Being aggrieved by the refusal to grant interim relief, the Appellants approached the Apex Court by filing S.L.P. (C) No.157 of 2003. While disposing of the S.L.P. on 20th April 2003, the Apex Court passed the following order :-

> "(1) The appellant shall not make any further construction on the property in dispute. However, if any finishing work is required to be done, that can be done without encroaching upon the land around the structure already made or the open land on the property.
>
> (2) Neither the appellant nor the third parties, who may be put in possession of the flats already construction, shall claim any equity in the event Respondent No.1 succeeds in the appeal, that is pending before the High Court, or in the suit, pending before the trial court. At the time of handing over of the possession of the flats to the third parties, this clause shall be made clear in the letter of handing over possession or in the document that may be signed between the appellant and the third parties at the time of purchasing the flats or occupying the flats.
>
> (3) The appellant, in addition to not making any constructions on the open land, shall keep an area of 648 square meters vacant as submitted before the High Court and that shall be kept free for the purpose of recreation.
>
> (4) The appellant shall not use any explosives on the property."

This order was passed by the Supreme Court without prejudice to the rights and contentions of the parties

in respect of the present Appeal or in the Suit pending before the trial Court. This order has been in operation for almost two years. It appears that Writ Petition (PIL) No.2009 of 2003 was filed by one Harjit Kaur Bhatty, residing of Girnar Apartments and a member of the society and another person, challenging the construction of the building on grounds which are similar to the ones raised by Respondent No.1 in the Suit.

9. Mr.Dwarkadas, learned Counsel appearing for the Appellants, submits that Respondent No.1 has no locus standi to file the Suit and can make no grievance in connection with the recreational ground. He submits that Respondent No.1 had not purchased any flat in the building which was constructed by developing Girnar Bungalow and, therefore, the question of her having any grievance regarding the absence of a recreational ground for this building does not arise. He urges that in view of the agreement of 20th August 1997 between Appellant No.7 and Respondent No.1, Respondent No.1 can have no objection to any construction which the Appellants are carrying on. He submits that the construction/ development of Girnar Bungalow has been made in accordance with law. According to the learned Counsel, the Development Control Regulation No.23(1) on which reliance is placed by Respondent No.1, has no

application to development/construction of an existing bungalow. He submits that this Regulation would be applicable only to new constructions and not to one such as the development/construction carried out by the Appellants. In his submission, the development is only in the nature of additions and alterations to the existing Girnar Bungalow and, therefore, D.C. Regulation No.23(1)(a) would not apply and consequently there was no need for the Appellants to provide any recreational ground. The learned Counsel then submitted that Development Control Regulation 35 is also not applicable to the facts and circumstances of the present case. Respondent No.1 had claimed that 648 sq.mtrs. land out of the total area of 4616 sq.mtrs. was required to be excluded for a recreational ground. The learned Counsel submits that apart from the fact that there was no requirement for providing a recreational ground, Development Control Regulation 35(1) provides for the method of computing the total area of a plot to be reckoned for the purposes of calculating FSI/built-up area permissible on the plot. He submits that Development Control Regulation 35(1) is applicable only where construction is carried out on a plot of land by utilising the existing FSI available in respect of that plot of land. In the present case, he submits that the FSI has been derived in lieu of the set back area acquired by the Bombay Municipal Corporation and from

TDR acquired by the Appellants and loaded on the Girnar Bungalow. Since no new development has been undertaken by the Appellants, the learned Counsel urges that Development Control Regulation 35(1) is not applicable to the construction.

10. Respondent No.1 has reiterated the submissions made by her at the hearing of the Motion. Besides this, she submits that the Apex Court having passed the above mentioned order, it should be continued till the hearing of the Suit. Furthermore, according to her, although the Supreme Court had directed the Appellants to keep an area of 648 sq.mtrs. vacant for the purposes of recreation, they had failed to do so and, therefore, she had filed Contempt Petition (C) No.316 of 2004 in CA No.3782 of 2003. On 6th August 2004, the Apex Court directed the Prothonotary and Senior Master of this Court to nominate an Engineer from the Panel maintained on the Original Side of the High Court to inspect the spot and report as to whether an open area of 648 sq.mtrs. has been maintained. Respondent No.1 has stated that the report was not available when the matter was argued before me.

11. In the circumstances of the case, I do not think it proper to pass any order other than that which the Supreme Court has passed. It is the contention of

Mr.Dwarkadas for the Appellants that they have been put to great prejudice as they have invested huge sums of money and are unable to get returns because of the uncertainty in the matter. Prospective purchasers of the flats have also to face hardship because of the conditions imposed in the order of the Apex Court. I do not see any reason to depart from that order. The question whether Development Control Regulations 23 and Regulations 35 are applicable to the facts of the present case would have to be considered. Apart from this, the factual matrix of the case would also have to be taken into account since it is the allegation of the Appellants that Respondent No.1 had in fact agreed not to object to any kind of construction which may be put up on the property which was conveyed to them by Sushilarani Patel. The signature of Respondent No.1 on this document has been denied by her and a Writ Petition in respect of the appointment of handwriting expert is pending before this Court. Furthermore, the Contempt Petition filed by Respondent No.1 is still pending before the Supreme Court. Taking into consideration all these aspects, I am of the view that the following order would meet the ends of justice :

(1) The Appellants shall not undertake any further construction on the property in dispute. However, if any finishing work is to be carried out, the same may be completed without encroaching upon the land surrounding the structure or the

open land on the property.

(2) Neither the Appellants nor third parties who may be put in possession of the flats already constructed, would be permitted to claim any equity in the event Respondent No.1 succeeds in Long Cause Suit No.2830 of 2002 pending before the Bombay City Civil Court. When the possession of the flats is handed over to third parties, they shall be intimated of this clause in the letter of possession or in the agreement between the parties.

(3) The Appellants will maintain an area of 648 sq.mtrs., vacant for a recreation ground. No construction of any other structure on the open land should be commenced or continued, if already commenced.

(4) No explosives shall be used by the Appellants on the property.

(5) The trial Court shall endeavour to dispose of the Suit as expeditiously as possible and in any event within a year from today.

12. Appeal From Order disposed of accordingly.

13. In view of the Appeal From Order being disposed of, nothing survives in Civil Application No.1125 of 2002 and the same is disposed of accordingly.

14. Certified copy expedited.